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10 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**
11 **CENTRAL VALLEY REGION**

12) Complaint No. R5-2016-0512
13)
14 In the Matter of the Administrative Civil) **OBJECTION TO THE HEARING**
15 Liability Complaint) **PROCEDURES, EVIDENCE, AND**
16) **POLICY STATEMENT**
17)

18 Hearing: April 21 / 22, 2016

19 The Malaga County Water District ("District" or "Malaga"), hereby objects to the
20 Central Valley Regional Water Quality Control Board's ("CVRB") hearing procedure for
21 Administrative Civil Liability Complaint R5-2016-0512 ("Hearing Procedure") and the
22 CVRB's Prosecution Teams evidence submittal, Witness list, and Policy Statement
23 lodged and/or mailed on or about February 18, 2016, and Attachments A and B to the
24 Administrative Civil Liability Complaint ("ACL").

25 **I.**

26 **OBJECTIONS TO THE HEARING PROCEDURES.**

27 The hearing procedures are objected to on the grounds that they fail to comply
28 with the Regional Water Control Board's Rules of Practice and Procedure related to

1 adjudicative proceedings and serve to deny rather than protect the District's right to full,
2 fair and meaningful hearing and to dispute and/or rebut the allegations against it as
3 more particularly set forth below.
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5 On or about January 27, 2016, the CVRB, through its Assistant Executive
6 Director issued and mailed the ACL to the District. The ACL was delivered with a
7 number of exhibits and attachments comprising several hundred pages of documents.
8 Nowhere in the hundreds of pages of documents is a document titled Notice of Hearing
9 or Hearing Notice. The only notice given is on page 12 of the Complaint which reads,
10 as follows:
11

12 **MALAGA COUNTY WATER DISTRICT IS HEREBY GIVEN NOTICE THAT:**

13 1. The Assistant Executive Officer of the Central Valley Water Board
14 proposes that the Discharger be assessed administrative civil liability in
15 the amount of one million thirty six thousand seven hundred twenty eight
dollars (\$1,360,728.00).

16 2. A hearing on this matter will be held at the Central Valley Water Board
17 meeting scheduled on **21/22 April 2016**, unless Discharger does one of
the following things by **16 February 2016**:

- 18 a. The Discharger waives the hearing by completing the attached
19 form (checking off the box next to option 1) and returning it to
20 the Central Valley Water Board, along with payment of the
proposed civil liability; or
21 b. The Central Valley Water Board agrees to postpone any
22 necessary hearing after the Discharger requests to engage in
23 settlement discussions by checking off the box next to option 2
of the attached form, and returning it to the Board along with a
letter describing the issues to be discussed; or
24 c. The Central Valley Water Board agrees to postpone any
25 necessary hearing after the Discharger requests a delay by
26 checking of the box next to option 3 on the attached form, and
returning it to the Board along with a letter describing the
issues to be discussed.

27 3. If a hearing on this matter is conducted, the Central Valley Water
28 Board will consider whether to affirm, reject, or modify the proposed

1 administrative civil liability, or whether to refer the matter to the Attorney
2 General for recovery of judicial civil liability.

3 If this matter proceeds to hearing, the Assistant Executive Officer
4 reserves the right to amend the proposed amount of civil liability to
5 conform to the evidence presented, including but not limited to,
6 increasing the proposed amount to account for the costs of enforcement
(including staff, legal and expert witness costs) incurred after the date of
the issuance of this Complaint through completion of the hearing....date
and signature omitted....

7 Attachment A: Calculations for pretreatment violations (and Exhibits 1
8 and 2)

9 Attachment B: Economic benefit table"

10 This page 12 of the ACL, which is referred to herein as the ("Hearing Notice")
11 makes no reference to specific procedures applicable to the ACL nor does it identify a
12 Hearing Officer or a Presiding Officer for the hearing and by the language set forth in
13 the Hearing Notice it appears that all decisions to be made regarding the hearing would
14 be made by the CVRB. Instead, it appears that the CVRB is requiring the District, to
15 search through the hundreds of pages of documents served with the ACL to find the
16 purported Hearing Procedures.
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18 The Hearing Procedures were included, separately, with the ACL and the
19 Hearing Notice set forth in the ACL. Those Hearing Procedures do not state who or
20 whom they were issued by so the District must speculate that they were issued by the
21 Assistant Executive Officer who issued the Complaint who is also a member of the
22 Board's Prosecution Team. The Hearing Procedures prescribe a number of
23 requirements for the submission of evidence, technical arguments or analysis and
24 policy statements, rebuttal evidence and also prescribe at page 6, various deadlines.
25 These deadlines include January 27, 2016, as the deadline for the Prosecution Team
26 to issue the ACL Complaint and Hearing Procedure and a February 5, 2016, for
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1 objections to the Hearing Procedures or to request "designated party" status. This
2 February 5, 2016, deadline is arbitrary, unreasonable, not authorized by any statute,
3 violates the District's statutory and constitutional rights to a full and fair hearing and
4 serves only as an apparent attempt by the Prosecution Team to deny the District its
5 right to a fair and meaningful hearing.
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7 This deadline to object to the Hearing Procedures requires the District, a Public
8 Agency, to respond to the ACL and the Hearing Procedures in only nine (9) calendar
9 days following the mailing of the ACL. The District is a Public Agency and can only
10 conduct meetings for this purpose pursuant to the Brown Act including the
11 requirements for a quorum and Public Notice. The arbitrary deadline buried in the mass
12 of documents that comprise this Complaint is invalid. The District submits its objections
13 to those procedures now.
14

15 The Hearing Procedures also require that the District, and other designated
16 parties by March 11, 2016, to "submit all materials required under "IV. submittal of
17 evidence, legal and technical arguments or analysis, and policy statement." This
18 requires the District to submit all of its legal argument, technical arguments, evidence,
19 and a list of all witnesses the District intends to call and all other information as
20 required under Section IV (ACL at page 3) of the Hearing Procedures less than three
21 weeks after receiving the evidence from the Prosecution Team. The evidence
22 submitted by the Prosecution Team, consists of more than two hundred (200) exhibits
23 and attachments comprised of approximately six thousand five hundred (6,500) pages.
24 This requirement is not only clearly unreasonable, it also violates the procedures for
25 this adjudicative proceeding as set forth below.
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1 Although neither the Hearing Notice nor the Hearing Procedures identifies the
2 ACL as an adjudicative proceeding, the Hearing Procedures under Section V. titled
3 “miscellaneous matters” does state under the subheading “Applicable Regulations” that
4 the “Regulations Governing Adjudicative Hearings before the Board may be found at
5 California Code of Regulations, Title 23, §648 et. sec.” and goes on to state that
6 “Any procedures not provided by this Hearing Procedure are not applicable to this
7 hearing. Except as provided in §648(b) and herein, Chapter 5 of the California
8 Administrative Procedures Act (Government Code, §11500 et. sec.) does not apply to
9 this hearing.” The assertion that any procedure not set forth in the Hearing Procedures
10 is not applicable to the hearing is in direct conflict with the State Water Board’s Rules
11 of Practice and Procedure for Adjudicative Proceedings (23CCR §648 et. sec.) and
12 Chapter 4.5 of the Administrative Procedures Act (Government Code §11400 et. sec.
13 “APA”), §801-805 of the Evidence Code, and §11513 of the Government Code.
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17 The Hearing Procedure also states that “[w]ith the exception of the “hearing time
18 limits” section, the Board Chair has approved this Hearing Procedure for the
19 adjudication of ACL matter.” This indicates that it was the Prosecution Team that has
20 set the hearing time limits and restricted Malaga’s time allotted for presenting evidence
21 and testimony, cross-examining adverse witnesses, and making a closing statement, to
22 60 minutes. As for the remaining “procedures” set forth in the Hearing Procedures,
23 including those set forth in Section IV., these procedures are not properly established
24 pursuant to the Rules of Practice and Procedure for Adjudicative Proceedings as
25 §648.4(b) which states:
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28 “The Hearing Notice may require that all Parties intended to present
evidence at a hearing shall submit the following information to the Board

1 prior to the hearing: The name of each witness whom the Party intends to
2 call at the hearing, the subject of each witnesses proposed testimony, the
3 estimated time required by the witness to present direct testimony, and the
4 qualifications of each expert witness. The required information shall be
5 submitted in accordance with the procedure specified in the Hearing
6 Notice."

7 As stated above, the Hearing Notice at page 12 of the ACL, does not provide
8 any such information. Further, this section does not provide for the setting of any
9 deadlines for such submissions, or set a time limit for the presentation of evidence, or
10 require the advance submission of rebuttal evidence. Similarly, 23CCR §648.4(c)
11 provides that

12 "[t]he Hearing Notice may require that direct testimony be submitted in
13 writing prior to the hearing. Copies of written testimony and exhibits shall
14 be submitted to the Board and to other parties designated by the Board in
15 accordance with provision of the Hearing Notice or other written
16 instructions provided by the Board. The Hearing Notice may require
17 multiple copies of written testimony and other exhibits for use by Board
18 and Board staff. Copies of general vicinity maps or large, non-technical
19 photographs generally will not be required to be submitted prior to the
20 hearing."

21 Nothing in either 23 CCR §648.4(b) or (c) requires that the parties submit all of
22 their legal and technical arguments or analysis or all evidence that the designated party
23 would like the Board consider. Further, not only do these sections not provide a
24 requirement that rebuttal evidence be submitted prior to the hearing, 23 CCR §648.4(f)
25 specifically prohibits a requirement that rebuttal evidence be submitted prior to the
26 hearing: "[r]ebuttal will generally not be required to be submitted in writing, nor will
27 rebuttal testimony and exhibits be required to be submitted prior to the start of the
28 hearing."

Therefore, the requirement that the designated parties submit any rebuttal
evidence and the names of each rebuttal witnesses are in clear violation of the Board's

1 own Rules of Practice and Procedure as are the requirements for all legal and
2 technical arguments and analysis and the sixty (60) minute time for the District to
3 present evidence and testimony, cross-examine adverse witnesses, and making a
4 closing statement. There are patently invalid requirements, that were inconsistent with
5 the requirements imposed by law and should all be stricken from the purported Hearing
6 Procedures.
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8 Moreover, even with in the limited discretion allocated to the CVRB or the
9 Presiding Officer, which in this case is not identified in the Hearing Notice, that
10 discretion is governed by 23 CCR §648(d) which allows the Presiding Officer to waive
11 requirements rather than impose them, "so long as those requirements are not
12 mandated by State or Federal statute or by the State or Federal Constitutions."
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14 Government Code §11425.10 reads, in pertinent part, as follows:
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16 "(a) the governing procedure by which any agency conducts an
17 Adjudicative Proceeding is subject to all of the following requirements:

18 (1) The agency shall give the person for which the agency action is
19 directed notice and opportunity to be heard, including the opportunity to
20 present and rebut evidence.

21 (2) The Agency shall make available to the person to which the agency
22 action is directed a copy of the governing procedure including a statement
23 whether Chapter 5 (commencing with §11500) is applicable to the
24 proceeding....

25 (4) The adjudicative function shall be separated from the investigative
26 prosecutorial and advocacy functions within the Agency as provided in
27 §11425.30."

28 The governing procedure adopted by an agency may include provisions
equivalent to, or more protective of the rights of the person, in this case
the District, to which the Agency action is directed, than the requirements
of §11425.10, which proscribes the minimum requirements."

By the Hearing Procedures apparently issued by the Prosecution Team, or the
CVRB is not only dictating what form the District's evidence is to take, when such

1 evidence is to be produced, how the evidence is to be provided, and the amount of
2 time to which Malaga will be allowed to present evidence, but is, in effect, altering the
3 required procedures set by statute or regulation, to create what amounts to a hearing
4 by briefs where the trier of fact, the CVRB, does not actually hear any substantive
5 evidence or argument. This directly contravenes Malaga's right to an opportunity to be
6 heard including the opportunity to present and rebut evidence to the CVRB. Moreover,
7 the issuance of the Hearing Procedures in whole, or in part, by the Advisory Team or
8 by the Prosecution Team, violates the requirements of Government Code
9 §11425.10(a)(4) that the adjudicative, investigative, prosecutorial, and advocacy
10 functions within the CVRB be separate.

13 The CVRB is required to give Malaga notice and a meaningful opportunity to be
14 heard, including the opportunity to present and rebut evidence. (Government Code
15 §11425.10(a)(1).) Pursuant to Government Code §11415.10, the CVRB must either
16 conduct its hearing in accordance with the procedures set by its Regulations, or, if it
17 fails to set those procedures by regulations, then the provisions of the APA apply. The
18 provisions of the APA apply in the event of any conflict with the provisions of the
19 CVRB's Regulations. (Government Code §11425.10(b).) The procedures set by the
20 purported Hearing Procedures do not conform to either the CVRB's Rules of Practice
21 and Procedure for Adjudicative Proceedings (23 CCR §648 et. sec.) or the procedures
22 required by the APA and are, as such, a nullity and invalid. (see *Niles Freeman*
23 *Equipment v. Joseph* (2008) 161 Cal. App. 4th 765, 789-790.) Further, the limitations
24 set by the Hearing Procedure are not appropriate to the character of this proceeding
25 and there has been no separate consideration by the CVRB of what procedure is
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1 required to conform with the APA and with the requirements of procedural due process.
2 (see *Petrillo v. Bay Area Rapid Transit District* (1998) 197 Cal. App. 3rd 798, 807-808;
3 *Smith v. Organizations of Foster Families for the Equality etc.* (1977) 431 U.S. 816;
4 *Shacket v. Osteopathic Medical Board* (1996) 51 Cal. App. 4th 223,230.)
5

6 The District not only objects to and refuses to consent to these Hearing
7 Procedures, but also objects to the Prosecution Team and/or the CVRB's issuance of
8 these Hearing Procedures without affording Malaga notice and an opportunity to be
9 heard on the suitability of the procedures purportedly mandated by the Hearing
10 Procedures which were not included in a Hearing Notice as required by law. Malaga is
11 plainly entitled to such notice and opportunity to be heard on the suitability of any
12 procedure which restricts the right of a person to have the opportunity to be heard or
13 places duties or burdens on that person not permitted by the applicable procedures
14 which is illustrated by the discussion of 23 CCR §648(d) whereby the Presiding Officer
15 may waive certain requirements pertaining to the conduct of adjudicative proceedings
16 but there is no provision for imposing new or different requirements as discussed
17 above.
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20 Based on the foregoing, the "Hearing Procedure" which was not included in the
21 Hearing Notice as required by the Water Board's Procedure for adjudicative
22 proceedings, does not conform with the requirements of the CVRB's Procedures (§648
23 et. sec.) or the APA, should be vacated in its entirety, and the District afforded notice
24 and an opportunity to be heard on any procedure which the Prosecution Team or the
25 Board proposes prior to the issuance of any such procedures. Malaga will proceed and
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1 present its case as it deems necessary as permitted and required by the governing
2 procedure including, but not limited to, Government Code §11425.10.

3 4 II.

5 OBJECTION TO EVIDENCE

6 The Malaga County Water District received what is purported to be the
7 Prosecution Team's evidence which was sent to the District via mail on or about
8 February 18 or 19, 2016. As stated above, this evidence consisted of more than 200
9 exhibits and attachments in excess of an estimated six thousand five hundred (6,500)
10 pages to which the District is, according to the Hearing Procedures, respond to in less
11 than twenty one (21) calendar days. This is yet another example of the Prosecution
12 Team using the Hearing Procedure to deny the District the right and opportunity to be
13 heard rather than provide for the District to be meaningfully heard on the ACL as
14 required by law. Needless to say, the District has not had an opportunity to review and
15 analyze all of the evidence submitted by the Prosecution Team. However, a cursory
16 review of the evidence along with the attachments to the ACL, makes clear that much
17 of the evidence submitted by the Prosecution Team is simply irrelevant and, of the
18 evidence that is ever arguably relevant, it amounts to hearsay testimony in the form of
19 reports and other documents which provide summary conclusions, statement of
20 opinions, and testimony by unknown and unidentified witnesses. Such evidence, which
21 amounts to testimony, must identify the person making the statements and the person
22 must appear at the hearing and affirm that the written testimony is true and correct. (23
24 CCR §648.4.) By submitting this evidence, which amounts to testimony by unidentified
25 persons, the CVRB and/or Prosecution Team is denying the District its right and
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1 making it impossible to cross-examine said witnesses and rebut the testimony by
2 concealing the identity of the witness(es). (see 23 CCR §648.5(a)(6), Government
3 Code §11513 (b), and 11425.10(a)(1).) To the extent that the evidence, including
4 attachments to the ACL, submitted by the Prosecution Team contains testimony, the
5 District objects now, and will in more particularity at or before the hearing and move to
6 exclude such evidence as it fails to identify the person or persons giving such
7 testimony, the testimony is not given under oath. The District cannot rebut testimony of
8 or cross-examine unidentified witnesses. To the extent that the evidence contains
9 hearsay or hearsay upon hearsay, District objects to all such hearsay evidence and will
10 object to such hearsay evidence, with more particularity, and move that all such
11 hearsay evidence be excluded on the ground that it is being presented as evidence
12 rather than for the purpose of supplementing or explaining other evidence. Such
13 objections are timely if made before the submissions of the case. (Government Code
14 §11513(d).) To the extent the evidence is irrelevant; the District will move to have such
15 evidence stricken.

16
17 To the extent that the evidence contains public records or records the CVRB or
18 Presiding Officer may take official notice of, such evidence is objected to on the ground
19 that such evidence has not been identified, notice has not been given to the District of
20 submission of such evidence, the District has not been provided with a reasonable
21 opportunity to refute official notice of such evidence, and the CVRB or the Presiding
22 Officer has not made a determination that any such evidence shall be taken notice of
23 as required by 23 CCR §648.2. The District objects to all such evidence and does and
24 will move that all such evidence be stricken at the hearing.

1 As stated above, the District has not had an opportunity to fully review and
2 analyze all of the purported evidence submitted by the Prosecution Team and therefore
3 reserves the right to object to and move to strike any and all evidence submitted by the
4 Prosecution Team at any time up to and including the submission of the case to the
5 Board for consideration and decision.
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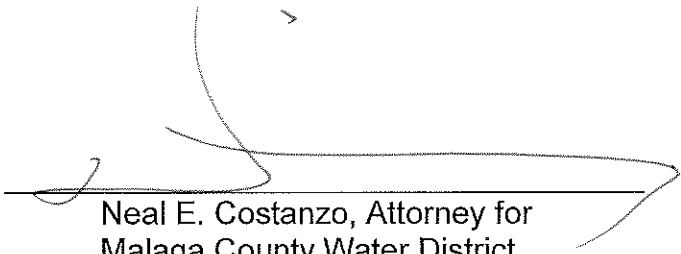
7 **II.**

8 **OBJECTION TO THE POLICY STATEMENT.**

9 The District hereby objects to and will move to strike the policy statement
10 submitted by the Prosecution Team on the ground that the policy statement amounts to
11 testimony by an unidentified person or persons and that there is no procedure for a
12 party to provide a policy statement to the Board. 23 CCR §648.10(d) provides that the
13 "Board or Presiding Officer may provide an opportunity for presentation of policy
14 statements or comments, either orally or in writing, by interested persons who are not
15 participating as parties in the proceeding." §648.1(d) goes on to describe such policy
16 statements as "non-evidentiary" and provides that the Board or Presiding Officer may
17 set forth, in the Hearing Notice, procedures for interested persons to present such non-
18 evidentiary policy statements. As such, these policy statements clearly do not apply to
19 parties to the action and, even if they did, the policy statement presented by the
20 Prosecution Team amounts to testimony by an unidentified person and must be
21 stricken from the record.
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23 Respectfully submitted,

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27 Dated: 3-11-16

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Neal E. Costanzo, Attorney for
Malaga County Water District